Supreme Court, U.S.
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No. (1)

In the Supreme Court of the United States

LEONARD W. KROUNER,
Petitioner,

v.

UNITED STATES TAX COURT,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI (REDACTED)

LEONARD W. KROUNER
Petitioner pro se

4196 MT. HUKEE AVENUE
SAN DIEGO, CA 92117-4732
(858) 277-5323

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTIONS PRESENTED

I.

Does a federal attorney disciplinary proceeding following a state attorney disciplinary proceeding meet minimum standards for procedural and substantive due process and satisfy the requirements in this Court's decisions where:

(1) the state court "automatically disbarred" the attorney without notice or opportunity to be heard based upon a criminal conviction by plea;

(2) the federal attorney disciplinary proceeding in the Tax Court was commenced by order to show cause which did not specify particular charges;

(3) the Tax Court prevented petitioner from introducing [redacted] and [redacted] testimony by telephone at the hearing it conducted although the Tax Court was equipped with courtrooms capable of receiving testimony by telephone;

(4) the Tax Court " hearing " was an oral argument which lasted less than one hour at which no evidence was allowed other than the petitioner's statement;

(5) neither the Tax Court nor the D. C. Circuit **found** " ... the facts of [the petitioner's] conduct and whether the conduct had been so grievous [when compared to similar conduct in other attorney discipline cases] as to require disbarment.";

(6) the Tax Court **could not** "... view [the attorney's] conviction in the context of any mitigating circumstances" because the Tax Court prevented the petitioner from

introducing [redacted] expert and [redacted] testimony by telephone, and the Tax Court Rules **did not** specify criteria for sanction such as the mitigators and aggravators set forth in the ***American Bar Association Standards for Determining Lawyer Discipline ("ABA Standards")***, App. A, 23a - 34a;

(7) neither the Tax Court nor the D.C. Circuit evaluated "... the conclusions to be drawn from the facts established by the evidence" , or made an "independent inquiry" into the [redacted] and other factors mitigating punishment ; and

(8) the Tax Court made "bare statements" unsupported by findings of real conduct based upon evidence when adding disbarment to the multiple criminal punishments the attorney suffered?

II.

Are notice of charges, an opportunity to present testimony, findings of fact based upon evidence, and conclusions of law essential in a federal attorney disciplinary proceeding following a state attorney disciplinary proceeding where disbarment was automatic?

III.

Should the attorney discipline decisions of this Court be followed, and the **ABA Standards** for determining sanction be adopted in federal attorney discipline proceedings following a state attorney discipline proceeding to resolve the split between the D.C. Circuit and the Ninth Circuit?

RULE 14.1(b) STATEMENT

The parties to this proceeding in the United States Circuit Court for the District of Columbia Circuit are:

Petitioner: Leonard W. Krouner.

Respondent: United States Tax Court

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PETITION FOR A WRIT OF CERTIORARI

Leonard W. Krouner ("Petitioner") respectfully petitions for a writ of certiorari to review what on information and belief is the unreported amended memorandum opinion and judgment of the U.S. Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

Upon information and belief the amended memorandum opinion of the U.S. Court of Appeals for the District of Columbia Circuit filed February 27, 2007 is unreported, and is reproduced at App. A, 8a - 12a.

Upon information and belief the memorandum sur order of the U.S. Tax Court dated October 22, 2004 is unreported, and is reproduced at App. A, 14a - 18a.

JURISDICTION

The order of the U.S. Court of Appeals for the District of Columbia Circuit sought to be reviewed was filed on February 27, 2007. This petition is timely under 28 U.S.C. § 2101(c), and Supreme Court Rule 13.1(3) and (5) because it is being filed pursuant to an extension of time to May 14, 2007 granted by The Chief Justice on March 19,2007 as indicated in a letter dated March 19,2007 from Case Analyst Gail Johnson reproduced at App. A, 1a - 2a. This Court has jurisdiction to review the judgment of the U.S. Court of Appeals for the District of Columbia Circuit pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions involved are the United States Constitution Fifth and Sixth Amendments. The relevant statutory provisions are reproduced at App. A, 21a - 22a.

STATEMENT OF THE CASE

This federal attorney disciplinary proceeding arises from petitioner's filing for and receipt of private disability insurance benefits from October 2000 to October 2001 ("benefits period").

During the benefits period petitioner suffered symptoms which caused petitioner's treating orthopedic and physical medicine and rehabilitation physicians to certify that petitioner was unable to perform the usual and customary duties of his occupation.

Petitioner provided releases during the benefits period authorizing insurer access to petitioner's medical and financial records, and insurer communication with petitioner's treating physicians. Petitioner provided insurers with monthly detailed expense statements from his professional practice. Petitioner accounted for all professional income received during the disability benefits period, and released professional income records to insurers .

During the benefits period petitioner suffered from untreated [redacted]. A [redacted] of petitioner's [redacted] is loss of confidence in ability to perform daily functions. Petitioner incorrectly reported inability to function professionally to insurers during the benefits period. Petitioner's incorrect reporting of professional functioning

during the benefits period resulted from judgment impaired by [redacted]. Upon recognizing that disability benefits were obtained by incorrect reporting of ability to function, petitioner offered to refund the benefits received. Petitioner's refund offer would only be accepted in the context of a criminal proceeding. Petitioner made full restitution of the disability benefits he received on May 12, 2003.

Proof of petitioner's [redacted] and its affect on petitioner's ability to assess and report on professional functioning consists of reports and/or testimony of an evaluating [redacted] in Albany, NY, and a treating [redacted] in La Jolla, Ca. The Tax Court order dated August 30,2004 which denied petitioner's motion to allow telephone testimony by [redacted] witnesses at the September 14, 2004 hearing in Washington D.C. prevented the Tax Court, the D.C. Circuit, and this Court from considering and evaluating medical evidence essential to determine sanction in this federal attorney discipline proceeding.

Petitioner's evaluating [redacted] testified by telephone from Albany, NY in petitioner's Florida attorney disciplinary proceeding. Contrary to the Florida Referee in petitioner's Florida disciplinary proceeding, the Tax Court concluded petitioner's evaluating [redacted] Florida testimony was insufficient to mitigate intent without any discussion (Tax Court Memorandum Sur Order dated October 22, 2004, App.,18a.). The Tax Court precluded questioning petitioner's evaluating [redacted] by not allowing him to testify by telephone although the Tax Court has courtrooms in Washington D.C. equipped to receive telephone testimony.

No evidence contradicted petitioner's evaluating [redacted] testimony that petitioner's reports of inability to

work during the benefits period contrary to the financial records petitioner released to insurers resulted from [redacted]. The Tax Court's finding that petitioner's medical evidence was insufficient to mitigate the effect of petitioner's guilty plea has no evidentiary support.

The D.C. Circuit Amended Memorandum Opinion affirming petitioner's disbarment by the Tax Court correctly found petitioner "... was, apparently without being given an independent hearing, 'automatically disbarred'" from the practice of law in New York [based upon petitioner's guilty plea in New York to insurance fraud, grand larceny, and workers compensation fraudulent practice felonies all arising from petitioner's receipt of disability benefits in 2000 /2001.] App. A, 8a. The D.C. Circuit Amended Memorandum Opinion at App. A, 11a held the Tax Court made "an independent evaluation of [petitioner's fitness to practice law]" based upon evidence introduced in petitioner's Florida attorney disciplinary proceeding.

The Tax Court's "independent evaluation of [petitioner's fitness to practice]" affirmed in the D.C. Circuit Amended Memorandum Opinion (App. A, 11a) consisted of a "bare statement" that "... the mitigating evidence presented by [petitioner is] unpersuasive and insufficient to mitigate the effects of his guilty plea." The Tax Court's disbarment was based upon "the counts" petitioner pled to which "involved acts of dishonesty that raise questions of integrity and fitness to practice law." App. A, 11a .

The issues in this Petition involve whether the procedure and substance of the legal process followed in the Tax Court and the D C. Circuit's review of the Tax Court decision conflict with "relevant decisions of this Court", and conflict

with "the decision of another United States court of appeals on the same important matter," under Supreme Court Rule 10(a) and (c).

The issues in this Petition also involve important national questions concerning whether uniform due process procedures and criteria for determining sanction in federal attorney discipline proceedings following state attorney disciplinary proceedings should be adopted.

REASONS FOR GRANTING THE PETITION

The elements of due process in a federal attorney disciplinary proceeding following a state attorney disciplinary proceeding have never been articulated by this Court.

Not identifying elements of due process in a federal attorney disciplinary proceeding following a state attorney disciplinary proceeding results in a process in federal courts such as the U.S. Tax Court which does not provide the accused or the public with sufficient notice of the charges upon which the proceeding is based, the procedures followed prior to and at the hearing to determine sanction, or the criteria to determine sanction.

Differences between the Second Circuit and D.C. Circuit procedure in attorney disciplinary cases are apparent from comparing the District Court and Second Circuit decision in *In Re Grievance Comm. Of the United States Dist. Court,* 847 F.2d 57, 61(2d Cir. 1988) with the Tax Court and D.C. Circuit decision in this case found at App. A, 8a - 12a, and 14a - 18a. The District Court and Second Circuit afford the accused attorney notice of specific charges, and opportunity to present evidence, and *de novo* appellate review of the District Court findings of fact and conclusions. The Tax

Court and D.C. Circuit in this case did not provide notice of specific charges, the procedure prior to or at hearing, the criteria to be applied in determining sanction, findings of fact based upon record evidence, did not allow essential [redacted] testimony by telephone, did not make any findings concerning the actual conduct, or afford de novo appellate review of the Tax Court's findings and legal conclusions.

Differences between the criteria applied in determining sanction in federal attorney discipline cases following state attorney discipline cases are apparent by comparing the Ninth Circuit holding in *Standing Comm. On Discipline of the United States Dist. Ct. for the Central Dist. Of California v. Yagman* , 856 F. Supp. 1395, 1396 (C.D. Cal. 1994), reversed on other grounds, 55 F.3d 1430 (9th Cir. 1995) with the D.C. Circuit holding in this case found in App. A, 8a - 12a. In *Yagman , supra* the Ninth Circuit held that the District Court's not applying the ***ABA Standards, App. A, 23a - 34a,*** for determining sanction in an a federal attorney discipline case was an abuse of discretion constituting reversible error. In this case the D.C. Circuit, over petitioner's objection, did not mention the Tax Court's refusal to apply the ***ABA Standards*** in determining petitioner's sanction.

Different procedures and different criteria in federal attorney discipline cases following state attorney discipline cases are likely to result in different sanctions for similar misconduct. In *Theard* v. *United States*, 354 U.S. 278 (1957) an attorney's forgery which resulted in monetary gain was excused by mental illness. In this case the D. C . Circuit accepted the Tax Court's unsupported and unexplained conclusion that the [redacted] evidence was insufficient to mitigate intent. Petitioner's objection to this conclusion is that nothing in the record supports rejecting the finding that

petitioner's reporting no income to his insurers contrary to the financial records petitioner released to insurers was the [redacted] of judgment impaired by [redacted]. The D.C. Circuit Amended Memorandum Opinion said "Although certain conditions may be sufficiently mitigating to overcome presumptive effect that a federal court must accord a state court disbarment under *Selling*, 243 U.S. at 50 - 51; see *Theard*, 354 U.S. at 292, [petitioner] fails to show that he was denied procedural due process. App. A, 11a.

The D.C. Circuit decision is troublesome for several reasons. First, it makes no effort to explain which "certain conditions" are sufficiently mitigating to overcome the presumptive effect of a guilty plea, and why petitioner's [redacted] bearing directly on his ability to correctly assess and report his level of professional functioning is insufficient to establish the real absence of dishonest intent. Second, it overlooks the Tax Court's unexplained, arbitrary denial of petitioner's request to have [redacted] witnesses testify by telephone to answer any questions the Tax Court had concerning the relationship between petitioner's [redacted] and intent during the benefits period. Third, it ignores petitioner's substantive due process objection to the Tax Court's finding [redacted] evidence insufficient to mitigate intent in the absence of contrary evidence, and erroneously finds that petitioner failed to show he was denied procedural due process.

Due process deficiencies in the Tax Court in this case include lack of adequate notice of specific charges prior to hearing, lack of notice of the pre hearing and hearing procedures, lack of notice of the criteria to be applied in determining sanction, preventing introduction of essential [redacted] evidence by telephone, making findings contrary to unchallenged evidence, and failing to make findings of fact

supported by record evidence. This case provides an opportunity to articulate minimum procedural and substantive due process requirements in federal attorney discipline proceedings following state attorney discipline proceedings.

I.
THE TAX COURT AND D. C. CIRCUIT PROCEEDINGS IN THIS CASE CONFLICT WITH THE DECISIONS OF THIS COURT

A. Procedural and Substantive Due Process Insufficiency of Charging Document and Tax Court Attorney Discipline Rules

Property and reputation interests in maintenance of a law license cannot be impaired or revoked without due process under *Selling v. Radford,* 243 U.S. 46 (1917) followed in *Theard v. United States*, 354 U.S. 278 (1957).

Attorney discipline proceedings "... are adversary proceedings of a quasi-criminal nature. Cf. *In re Gault,* 387 U.S. 1, 33. The charge must be known before the proceedings commence." *In re Ruffalo,* 390 U.S. 544, 551 (1961).

Disbarment is a penalty which cannot be imposed without due process. *In re Ruffalo,* 390 U.S. 544 at 550 (1968) relying upon *Ex Parte Garland,* 4 Wall. 333, 380 and *Spevack v. Klein,* 385 U.S. 511, 515.

> "... [T]he central meaning of procedural due process has been clear: 'Parties whose rights are affected are entitled to be heard; and in order that they may enjoy that right, they must first be notified. *Baldwin v. Hale,* 1 Wall 223, 233. *See Windsor v. McVeigh,* 93 U.S.

> 274; *Hovey v. Elliott*, 167 U.S. 409; *Grannis v. Ordean*, 234 U.S. 385. It is equally fundamental that the right to notice and an opportunity to be heard "must be granted in a meaningful time and in a meaningful manner."
> Armstrong v. Manzo, 380 U.S. 534, 552.

Fuentes v. Shevin, *407* U.S. 67, 80 (1972).

Neither the Tax Court order to show cause dated July 16, 2004 initiating this proceeding (App. A, 19a - 20a), nor the Tax Court Rules notified respondent of specific charges, the procedure, or the criteria to be applied in determining sanction. Lack of notice of specific charges, the procedure to be followed prior to or at the hearing, or the criteria to be applied in determining sanction are fundamental procedural and substantive due process deficiencies.

B. Procedural and Substantive Due Process Insufficiency of Not Allowing Introduction of Essential [redacted] Testimony By Telephone

As a practical matter petitioner was unable to produce [redacted] witnesses located in Albany, NY and La Jolla, CA at the Tax Court hearing in Washington D.C. Petitioner's pre hearing motion that his [redacted] witnesses be allowed to testify by telephone is consistent with the Tax Court's representation that its courtrooms can receive testimony via telephone or other media from locations outside the courtrooms.

Petitioner's [redacted] witnesses were essential to establish that non disclosure of income from law practice during the benefits period was a symptom of illness rather than a dishonest act.

The Tax Court order dated August 30, 2004 denying petitioner's motion to produce essential [redacted] testimony by telephone denied petitioner the ability to produce [redacted] evidence essential to the determination of sanction.

Production of favorable testimonial evidence is as important to due process as the confrontation of adverse witnesses recognized in *Beard v. Star,* 370 U.S. 41, 43 (1962).

The Tax Court's unexplained denial of petitioner's motion to produce essential [redacted] testimony by telephone is another procedural and substantive due process deficiency in the Tax Court procedure to determine disbarment.

C. Tax Court and D. C. Circuit Not Determining the Facts of Petitioner's Misconduct or Whether the Misconduct Was So Grievous as to Require Disbarment

The primary purpose of attorney discipline is determine whether the attorney's practicing law is a danger to the public. *See e.g., In re Sharp*, 674 A.2d 899, 900 (D.C. 1996) holding "'[t] he traditional view of Anglo- American jurisprudence [is] that disbarment is intended not as punishment, but as protection to the public'") (internal citation omitted).

Where illness rather than dishonest motive is the real cause of criminal misconduct this Court has held disbarment is a gross injustice. *See e.g., Theard v. United States* , 354 U.S. 278 (1957) where disbarment for forgery as a result of illness was not allowed as a :"gross injustice." State courts also hold that criminal misconduct victimizing clients, other attorneys, and the public where full restitution was not made

- generally considered more serious than receiving and returning disability insurance benefits under an [redacted] induced misconception of inability to function - can be mitigated by proof that [redacted] was the real cause. *See e.g., In re Cappell,* 866 A. 2d 784 (D.C. 2004) where disbarment was stayed and a three year suspension imposed on an attorney who stole client funds while in a major depression, *In re* Weiss,839 A2d 670 (D.C. 2003) where a mentally ill attorney was suspended for three years for stealing law firm funds 54 times totalling $676,465.79, and *Discipline of McClendon,* 120 Wn..761, 845 P.2d 1066 (Wn. 1993) where a mentally ill attorney who pled guilty to felony theft of client funds, failed to repay $1,127, 853 in borrowed client funds, committed 11 other ethical violations, and was on criminal probation received a two year retroactive suspension.

"Bare statements" the evidence was insufficient to mitigate the effects of a guilty plea , such as that made by the Tax Court in this case, App. A, 18a, are legally insufficient to support disbarment under *Selling v. Radford,* 243 U.S. 46, 51 (1917).

The D.C. Circuit did not determine "... the facts of [petitioner's] conduct and whether the conduct had been so grievous as to require disbarment." in accordance with *In re Ruffalo,* 390 U.S. 554, 552 (1968). Instead of following *Ruffalo, id.*, the D.C. Circuit unacceptably rationalized the Tax Court's refusal to determine the real basis for petitioner's misconduct, and then refused to determine the seriousness of petitioner's misconduct when compared to illness induced conduct in other attorney discipline cases. The D.C. Circuit's refusal to follow *Ruffalo, id.*, is evident from its statement that considering attorney discipline cases offered to demonstrate that petitioner's conduct is not serious enough to

warrant disbarment would be to "second guess" the Tax Court. App. A, 12a.

II

NOTICE OF CHARGES, AN OPPORTUNITY TO PRESENT TESTIMONY, FINDINGS OF FACT BASED UPON EVIDENCE, AND CONCLUSIONS OF LAW ARE ESSENTIAL IN A FEDERAL ATTORNEY DISCIPLINARY PROCEEDING FOLLOWING A STATE ATTORNEY DISCIPLINARY PROCEEDING WHERE DISBARMENT WAS AUTOMATIC ?

Disciplinary impairment of an attorney's license to practice law effects Constitutionally protected liberty, property, and reputation interests.

The Fifth Amendment requires that government deprivation of such interests must be accompanied by " . . . minimum procedural safeguards, including some form of notice and hearing, the formality and procedural requisites for such a hearing varying, depending upon the importance of the interests involved and the nature of subsequent proceedings." *Arnett v. Kennedy,* 416 U.S. 134 (1974).

An attorney's liberty, property, and reputation interests in his law license are as important as those of a nonprobationary federal employee's liberty and property interest in his job, or the interests of a special education student or his legal representative in receiving an appropriate education, or the interests of numerous other persons who are entitled to notice, hearing, the opportunity to introduce favorable evidence, to confront adverse evidence, and a decision including findings of fact supported by references to record evidence, and conclusions of law supported by references to

legal authority when government action effecting those interests occurs.

The Tax Court and District of Columbia Circuit disbarring petitioner in this proceeding initiated by an order to show cause devoid of specific factual charges, with no defined procedures for discovery, introduction of or challenges to evidence, with no requirement for a legally sufficient decision supported by record evidence and legal authority demonstrates the need for this Court to articulate minimum due process standards in federal attorney discipline matters. That need is especially acute in cases, like this, where state court disbarment occurred with no hearing.

III.
THE DECISIONS OF THIS COURT SHOULD BE FOLLOWED AND THE *ABA Standards* ADOPTED AS THE CRITERIA FOR DETERMINING SANCTION IN FEDERAL ATTORNEY DISCIPLINE CASES FOLLOWING STATE ATTORNEY DISCIPLINE CASES

Variations in sanctions in federal attorney discipline cases under similar circumstances are more likely when individual Circuit Courts decide not to follow the clear holdings of this Court, and make up their own separate procedural rules and findings to rationalize a certain result contrary to unchallenged evidence.

The uncontroverted [redacted] evidence rejected by the Tax Court and the District of Columbia Circuit here is that [redacted] - not dishonest motive - caused inaccurate reporting of income producing activity contrary to income producing documents petitioner released to insurers.

Rejection of facts supported by unchallenged [redacted] evidence is a "gross injustice" equivalent to the "gross injustice" of adding disbarment to multiple criminal penalties the petitioner endured because of [redacted] induced incorrect reporting of income producing activity. The *Selling v. Radford,* supra "gross injustice" exception to federal court adoption of state court automatic disbarment should be applied in this case to prevent Tax Court disbarment.

Rather than encourage federal circuit courts not to apply uniform criteria when determining federal attorney discipline sanction , a preferred approach is for federal courts to apply uniform criteria for determining attorney sanction such as that set forth in the **ABA Standards**, and to follow the holdings of this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Leonard W. Krouner,
Petitioner
4196 Mt. Hukee Avenue
San Diego, CA 92117- 4732
(858) 277-5323

July 9, 2007